IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY, *Petitioners*,

—v.—

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON STATE, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, NATIONAL ASSOCIATION OF BROADCASTERS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, and THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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November 17, 1983

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1721

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY,

Petitioners,

—v.—

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The American Civil Liberties Union, The American Civil Liberties Union of Washington State, American Newspaper Publishers Association, American Society of Newspaper Editors, Associated Press, National Association of Broadcasters, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, and the Society of Professional Journalists, Sigma Delta Chi, move pursuant to Rule 36.3 of the Rules of the Supreme Court of the United

States for leave to file a brief amicus curiae in support of the Petitioners. The written consent of the Petitioners is on file with the Court. Respondents have refused to consent to the filing of this brief and thus have required the making of this motion.

Each of the organizations which have joined as amici on this brief have a special interest in the resolution of the issue on which this Court has granted a writ of certiorari. The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit membership organization of over 250,000 members dedicated to the promotion and defense of the fundamental personal liberties guaranteed by the Constitution of the United States. Foremost among these liberties is freedom of speech protected by the First and Fourteenth Amendments. The ACLU of Washington State is the state chapter of the national organization which represents those interests within the State of Washington.

The American Newspaper Publishers Association is a national trade association representing approximately 14,000 newspapers, including Petitioner, Seattle Times. The member newspapers constitute 90% of the total daily and Sunday circulation and a substantial portion of the weekly newspaper circulation in the United States.

The National Association of Broadcasters is a trade association consisting of over 5,200 radio and television stations and all of the nationwide commercial broadcast networks. Among its primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The Radio-Television News Directors Association ("RTNDA") is a non-profit, professional organization of journalists. RTNDA includes approximately 2,000 members who are active at the network and local levels in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news

editors from the print and broadcast media devoted to the protection of the First Amendment and the freedom of information interests of the press.

The Society of Professional Journalists, Sigma Delta Chi (the "Society") is a voluntary, non-profit organization of 28,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States. Among the Society's purposes are to insure that the public business is conducted in public and to keep government proceedings, including court hearings, open to public inspection.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of ASNE, which was founded over fifty years ago, include the maintenance of the dignity and right of the profession, and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Associated Press is a membership non-profit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing, and transmitting news reports and photographs to its 1,350 member newspapers and its 3,300 member broadcast stations throughout the United States, and to other publishers throughout the world.

Collectively, the amici represent a broad spectrum of those citizens and organizations whose interests in freedom of speech and freedom of press are acutely threatened by the decision by the Washington Supreme Court on review here. Protective orders are a key feature of civil litigation in both state and federal courts. Because members of the amici are constantly parties to such lawsuits, the resolution of the constitutional question to be decided by this Court will directly and perva-

sively affect the amici and their members. The amici, because they are particularly concerned with the national implications of the rulings at issue here, will present to the Court a broader perspective on the interaction between the Constitution and discovery rules than the parties will provide.

Respectfully submitted,

JAMES C. GOODALE

James C. Goodale

Dated: November 17, 1983
New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Civil Rules of the Superior Court of Washington

Federal Rules of Civil Procedure

Other Authorities

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INTERESTS OF AMICI CURIAE

A motion for leave to file this brief is being presented to this Court today pursuant to Rule 36.3 of the Rules of this Court. The interests of the respective amici are set forth in the motion, which is bound with this brief as provided by Rule 33.2(b). The amici have appeared frequently in this Court and in other courts in cases presenting challenges to First Amendment liberties.

As interpreted by the Washington Supreme Court, Civil Rule 26(c) allows that state's courts to impose impermissible burdens on the press's rights under the First and Fourteenth Amendments to the United States Constitution by authorizing protective orders that restrict the right to publish upon a showing far less exacting than that demanded by the Constitution and decisions of this Court. More broadly, the rationale of the Washington Supreme Court belittles the First Amendment rights to free speech and press which trial courts should take into account when issuing protective orders. Protective orders like the one sanctioned here represent a serious interference with the ability of organizations like amici and their members to perform their vital, constitutionally protected function of providing information to the public.

STATEMENT OF THE CASE

The Seattle Times Company, one of the defendants in this action, published several articles that discussed the finances of the Aquarian Foundation and its founder, Keith Rhinehart, two of the plaintiffs. The articles described plaintiffs' various religious beliefs and practices. In the course of discovery, defendants sought documents concerning plaintiffs' financial affairs, Foundation membership and donations to plaintiffs, all of which was "relevant upon the issues of truth and damages." *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 228, 654 P.2d 673, 675 (1982). Plaintiffs refused to produce certain of these documents and requested the court to deny

discovery or alternatively to enter an order limiting the use to which defendants could put any information obtained in discovery.

The trial court ordered the documents disclosed but entered a broad protective order expressly prohibiting defendants from publishing this information or making it available to any news media for publication or dissemination. The trial court explained that "Protective Orders are entered routinely where the party seeking the Protective Order has a reasonable basis for its request" that the information be used for no purpose other than the litigation. Joint Appendix ("JA") 52a, 65a. The court reasoned that, since "access to the courts [was] on an equal plane of importance with freedom of the press," a protective order was appropriate where its absence "*could* have a chilling effect on a party's willingness to bring his case to court." JA 54a, 64a (emphasis added). The court never substantiated any of these general observations with particular facts in the record.

The Washington Supreme Court granted discretionary review and affirmed the entry of the protective order. The majority purported to apply the three-part test for analyzing restrictions on First Amendment rights articulated in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). However, the court summarily concluded that there was no acceptable alternative to the protective order and that the protective order would be effective in preventing "unwanted publicity." The "main inquiry" for the court, therefore, was reduced to whether a sufficient interest justified the protective order. 98 Wash. 2d at 231.

The court determined that protective orders generally were authorized to protect "the individual's right of privacy and to secure willing and honest responses" to discovery requests. 98 Wash. 2d at 238. The majority, however, never identified the precise privacy interests of plaintiffs threatened by defendants' legitimate discovery requests. Again without reference to the facts before it, the court stated as a universal proposition that parties, rather than exposing themselves to unwanted publicity

if no protective order was available, would either forgo the pursuit of their just claims or be tempted to withhold information. Admitting that it was "a matter of speculation" what the actual effect would be in any given case, the majority stated that its concern was instead with "the cloud which will be cast upon the integrity of the discovery process." 98 Wash. 2d at 654.

On the other hand, the court dismissed as "minimal" the interest of the public in knowing what information was revealed in discovery proceedings. The court contended that publishing the information involved no element of advocacy or dissemination of ideas, but "only the reporting of supposed facts," a situation which the court found to lighten the burden of justifying the restraint. 98 Wash. 2d at 230, 249. Yet, even when it admitted that the information in the present proceeding could rightly be deemed "newsworthy," the majority opined that the news media had "flourished" notwithstanding restrictions sometimes imposed during discovery. In addition, the majority found that the proper functioning of pretrial proceedings was not promoted by giving defendants the right to disclose information obtained during discovery. 98 Wash. 2d at 255.

The majority therefore concluded that the interest of the judiciary in the integrity of its discovery processes was itself sufficient to meet the "heavy burden" of overcoming the presumption against prior restraints. Thus the court held that, in determining whether "good cause" was established under Civil Rule 26(c), courts needed only to determine whether the order prevented any harm identified in the rule without impeding the discovery process. 98 Wash. 2d at 256.

SUMMARY OF ARGUMENT

Under the Washington Superior Court Civil Rules, as under the Federal Rules of Civil Procedure, courts may enter protective orders that impose restrictions on discovery. The principal purpose served by protective orders is to prevent abuse which might otherwise arise because of the liberal scope of discovery permitted under the Rules.

The "good cause" that the moving party must show to obtain a protective order requires the court to weigh that party's need for protection against the disadvantages caused by subjecting the opposing party to the requested restriction. When the order sought impinges upon a party's right of free speech or free press, the rule should require the court to take full account of the party's First Amendment interests in determining whether good cause exists for granting the application.

When a court considers a motion under Civil Rule 26(c) that would restrict another party's right to publish information gained during discovery, it should incorporate in the "good cause" standard the stringent First Amendment analysis prescribed by this Court in cases raising similar First Amendment concerns.

Courts should not impose restraints on parties' freedom of press or speech without, at a minimum, a showing that the particular circumstances demonstrate an overriding interest to be served by the protective order for which there is no alternative intruding less on First Amendment interests. Such an order should be narrowly drawn and shown to be effective in preventing the specific harm sought to be avoided. Neither the trial court nor the Washington Supreme Court applied this standard or articulated any findings to justify a conclusion that plaintiffs could meet such a standard.

ARGUMENT

I. DISCOVERY RULES REQUIRE THAT FIRST AMENDMENT INTERESTS BE CONSIDERED.

The decisions by the Washington courts reflect a fundamental misconception about the relationship between the discovery process and the constitutional freedoms of speech and press. Those courts presumed that there was an inherent and irreconcilable tension between the right of courts to protect the orderly process of discovery and the right of litigants to remain free of unwarranted infringements of their First Amendment rights. No such conflict exists. Rather, Civil Rule 26(c), like Rule 26(c) of the Federal Rules of Civil Procedure, should be interpreted so that First Amendment concerns are taken into account in determining whether a party has shown "good cause" for a protective order.

The Civil Rules of the Superior Court of Washington are modeled after the Federal Rules of Civil Procedure. *See generally*, 2 L. Orland, *Washington Practice: Trial Practice* § 161.1 (Supp. 1983). The Washington courts have traditionally looked to the commentary and cases relating to the federal rules when interpreting their own civil rules. *See American Discount Corp. v. Saratoga West, Inc.*, 81 Wash. 2d 34, 37, 499 P.2d 869, 874 (1972). In this action, the Washington Supreme Court expressly noted that the federal rules were the basis for Civil Rule 26(c). Furthermore, the Court looked to federal court decisions and treatises on the federal rules to explain the purposes of discovery and the role of protective orders. *See Rhinehart v. Seattle Times*, 98 Wash. 2d 226, 231-235, 654 P.2d 673, 676-679 (1982).

It is therefore clear that the Washington Supreme Court intended to interpret Civil Rule 26(c) as it believed this Court would interpret the Federal Rules of Civil Procedure. If the Washington courts erred in perceiving how this Court would construe the federal rule governing protective orders consistent with First Amendment interests, this Court may assume that

the Washington courts will also apply their identical state rule consistent with the constitutional command. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). *See also, South Dakota v. Neville*, ____ U.S. ____, 103 S. Ct. 916, 919 n.5 (1983).

Both sets of Rules have virtually identical provisions governing pretrial discovery, including the circumstances under which documents may be obtained from parties and non-party witnesses. Civil Rule 26(b) authorizes parties to discover any unprivileged material that is relevant to the claims or defenses in the pending action. If the person from whom discovery is sought fears that the discovery request will cause him annoyance, embarrassment, oppression or undue burden or expense, the Rule puts the burden on him to move for an order protecting him from such harms. The Rule further states that the court may grant a protective order only upon a showing of "good cause" by the moving party. If this burden is met, the court has wide latitude to fashion an order responsive to the competing needs of the parties.

Without a specific court order directing otherwise, the results of discovery may be used freely by the discovering party and traditionally have been open to the public. "As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *See American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir.), *cert. denied*, 440 U.S. 971 (1979).[1] Materials legitimately obtained during discovery may be used for any purpose, including dissemination to the public. *National Polymer Prods. Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D.

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1 The rules of civil procedure have made pretrial discovery an important part in the trial of civil actions. In view of this Court's finding that civil actions have been presumptively open to the public, the practice of public pretrial discovery is well-founded in history and policy. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (Burger, C.J.) (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979).

503, 508 (S.D.N.Y. 1955). The party seeking to limit disclosure must establish the "good cause" ordinarily required for a protective order. *See* 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2035 at 264-65 (1970); 4 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, § 26.75 at n.3 (1977-1978 Supp.).

A party seeking to show good cause cannot simply rely on conclusory statements of need, but must make a particularized and specific factual demonstration. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981); *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); 8 C. Wright & A. Miller, *supra* at 265. *Cf. Darling v. Champion Home Builders Co.*, 96 Wash. 2d 701, 638 P.2d 1249, 1250 (1982) (protective order under Rule 23(d) must be based "upon a clear record and specific findings of fact and conclusions of law"). In essence, the "good cause" standard compels the court to measure how the order avoids the specific harm identified by the moving party against any disadvantage to the party against whom the order is sought. *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation*, 669 F.2d 620, 623 (10th Cir. 1982); *General Dynamics Corp. v. Selb Mfg. Co., supra*, 481 F.2d at 1212.

When a request for a protective order does not implicate a constitutionally protected interest, it may be appropriate for a court to enter such an order when the moving party's request is reasonable. Thus, an order may require discovery to occur at a different time or in a different manner than that set forth in the notice in order to avoid unnecessary inconvenience. *See, e.g., Colonial Capital Co. v. General Motors Corp.*, 29 F.R.D. 514 (D. Conn. 1961).

But when a protective order directly affects a party's First Amendment interest in freedom of speech or press, the language and logic of Civil Rule 26(c) both permit and demand that the threat to those constitutional interests be considered in

determining whether good cause exists for the issuance of the order. "Good cause" is designed to be a flexible standard which takes account of the strength of the conflicting interests present in different proceedings. Measuring "good cause" by a more exacting standard of need when protective orders impinge upon constitutional rights is thus consistent with the policy of and prevailing practice under the rules governing discovery.[2] Hence, under the "good cause" requirement, the Washington courts should have taken First Amendment interests into account and required a heightened showing of need before entering the protective order.

II. THE PROTECTIVE ORDER APPROVED BY THE WASHINGTON COURTS VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS.

A. Protective Orders Restricting Communication Infringe Significant First Amendment Interests.

Protective orders that curb the right of parties to disseminate information are equivalent to "orders that prohibit the publication or broadcast of particular information or commentary" for which this Court has consistently demanded a "heavy burden" of justification to be met. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556, 558 (1976). *See In re Halkin*, 598 F.2d 176, 183-85 (D.C. Cir. 1979); *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200, 204 (S.D.N.Y. 1977). *See also* Note, Rule 26(c), Protective Orders and the First Amendment, 80 *Colum. L. Rev.* 1645, 1651 (1980).

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2 Requiring the courts to be sensitive to First Amendment interests when formulating protective orders promotes the policies of the recent amendments to the Federal Rules of Civil Procedure. The amendments "contemplate greater judicial involvement in the discovery process," and suggest that it is a healthy process to require the judge to think through whether all of the parties' requested discovery is necessary, especially when competing concerns are evident. Fed. R. Civ. P. 26 advisory committee note (1983).

Whatever a protective order is called is not critical to this case. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-102 (1979). Regardless of the name, the order here directly restricts the right of the defendants to publish information that they would otherwise be free to print. By forcing unwilling parties to forgo certain speech and press activities while engaged in discovery proceedings, protective orders like the one entered here directly impinge upon significant First Amendment interests. *See In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981); *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979); *see also Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (*en banc*), *aff'd on other grounds*, 452 U.S. 89 (1981).

In a similar context, this Court has recognized the nature of the threat to litigants' constitutional rights posed by orders forbidding parties or their counsel to communicate information about pending litigation:

> "Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involves serious restraints on expression. This fact, at minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses."

Gulf Oil Co. v. Bernard, 452 U.S. 89, 103-04 (1981).[3] The Washington courts paid little attention to the serious restraints which this Court recognized in *Gulf Oil*. The concerns that motivated this Court's observations in *Gulf Oil* should guide it in interpreting Civil Rule 26(c) consistent with the First and Fourteenth Amendments.

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3 The order in *Gulf Oil*, which was issued pursuant to Fed. R. Civ. P. 23(d), forbade parties to a class action or their counsel from communicating with other class members without the approval of the court. The United States Court of Appeals for the Fifth Circuit had decided that the order constituted a prior restraint in violation of the First Amendment. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (*en banc*). This Court, however, held that the order was an abuse of the court's supervisory powers, and therefore did not rule on the constitutionality of the order.

Court-ordered restrictions on a party's right to speak or publish during pretrial discovery represent "serious restraints of expression." If a party had not undertaken discovery in connection with a lawsuit, it would be free to "present its case" to the public.[4] That the documents or facts sought to be discussed were obtained through discovery procedures does not diminish at all the parties' interest in revealing or commenting on that information. Indeed, parties may have particular reasons for talking about information obtained in the course of litigation. If the party is normally engaged in an advocacy role, as are civil rights organizations and environmental groups, the subject matter of the litigation may be of critical importance to its regular activities. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963). Private businesses may likewise wish to alert customers, potential clients or the industry to facts uncovered during litigation or to trial developments affecting it or its relations with others. A corporate defendant might wish to assure shareholders, creditors and other interested parties that lawsuits brought against it are ill-founded. Soliciting funds, generating support from persons with similar interests or claims, or making the public aware of problems which call for legislative action helpful to the litigant, all present genuine and tangible free press and free speech interests of parties involved in civil lawsuits.[5] The Washington

4 This Court has observed that, as a means for advocating the legal claims that a party may have, litigation is a protected First Amendment activity. *See In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963). Protective orders restraining publications during trial or pre-trial proceedings therefore implicate not only the party's exercise of free speech and press outside the courtroom but also dilute the party's First Amendment interest in using the litigation to articulate publicly, on the basis of all available evidence, the validity of his claims.

5 In this regard, this Court has repeatedly found that the character or social utility of protected speech and published material does not alter the scope of its constitutional protection. It protects equally fact and political advocacy, the entertaining as well as the informative. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Supreme Court partially recognized this First Amendment interest by conceding that a court could not enter a protective order that would forbid a party from printing information obtained outside of the discovery process. 98 Wash. 2d at 257.

The immediate effect of the protective order here will be to prevent the defendants from publishing the information obtained in discovery. As a practical matter, it may also prevent them from publishing information obtained from other sources. As the court recognized in *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200, 205 (S.D.N.Y. 1977):

> It would be impractical, to the point of impossibility, for this Court to determine, if ostensibly protected information is later published, whether defendants came by it in the ordinary fashion, or through violation of our pre-trial order. Any attempts so to inquire would be unduly intrusive into journalistic sources, and have a chilling effect on First Amendment rights . . . . I find this argument to be the most powerful in opposition to the proposed order.

Because the Washington protective order attempts to draw distinctions among First Amendment rights based on the source of information, it inherently threatens discussion which the Washington courts readily admit to be privileged from judicial restraint.

Corresponding to a litigant's right to speak about his claims is the interest of the public in receiving information. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *Virginia Pharmacy Board v. Virginia Pharmacy Council, Inc.*, 425 U.S. 748 (1976). The public interest in the operation of the judicial system in all of its phases has been repeatedly recognized. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Bridges v. California*, 314 U.S. 252 (1941).

The general public may have a keen interest in the subject matter of the lawsuit it if involves issues of government, the economy or civil liberties. At the same time, essentially private disputes may be of intense concern to a more limited audience, whether to a segment of industry, a geographic locale or a special interest group. Parties may want to discuss information they discover about hazardous working conditions in certain factories or to warn others about actions by the Government which might directly affect them, such as the dissemination or control of harmful chemicals and other substances. Independent of these concerns, the public has an urgent interest in knowing that its judicial processes yield "true and accurate factfinding," the very function served by discovery in civil litigation. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, J., concurring).

When a protective order restraining publication of information is imposed upon a newspaper that has been made a defendant to the litigation, the injury to First Amendment interests is particularly apparent. The very business of the press is informing the public about newsworthy information. This Court has recognized the special role the press plays in communicating facts and disseminating commentary that the public cannot easily obtain for itself, especially about judicial and governmental operations. "Instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media . . . ." *Richmond Newspapers, Inc. v. Virginia, supra,* 448 U.S. at 577 n.12 (1980) (Burger, C.J.), 586 n.2 (Brennan, J., concurring). *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781-82 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). While the same free speech interests are implicated by protective orders restraining individuals from publicizing the events of their trial proceedings, protective orders applied to the press graphically demonstrate the threat posed to First Amendment rights and the profoundly disturbing impact on the right of citizens to receive information.

The courts below summarily concluded that plaintiffs' unspecified privacy interests and general concern for judicial administration justified the subordination of defendants' First Amendment rights. This Court has made clear, however, that "[d]esignating the conduct as an invasion of privacy. . . is not sufficient to support an injunction" against otherwise protected speech. *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975). Purported governmental interests in effective judicial administration and fair trials have also given way to free press and speech interests. *See Pennekamp v. Florida*, 328 U.S. 331, 347 (1946).

Indeed, only last year, this Court held that the press's First Amendment interests were not overcome by similar and more compelling interests than those advanced by the Washington Supreme Court. In *Globe Newspaper Co. v. Superior Court, supra,* the state attempted to justify a mandatory court closure rule on the ground that it was necessary to preserve the privacy of the minor sex victim and to encourage such victims to come forward and provide accurate testimony. Those articulated interests, as revealed in the circumstances of that case, were found insufficient to justify the broad rule created there. The protective order in this civil proceeding should receive no less strict scrutiny. Therefore, before a court may impose such an order upon parties as a condition to engaging in discovery, it must weigh the moving party's showing of good cause in a manner that is appropriately sensitive to the First Amendment interests at stake. *See also Elrod v. Burns*, 427 U.S. 347 (1976).

B. The Washington Supreme Court Failed to Apply the Proper Constitutional Standard.

All courts except the Washington Supreme Court have recognized that protective orders restraining speech or press activities infringe on First Amendment interests. These courts have articulated in different terms formulas to incorporate these values.

Thus, in weighing a claim by the press for access to sealed discovery materials, the Court of Appeals for the First Circuit held that a court must "look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary." *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981). The Court of Appeals for the District of Columbia Circuit applied a similar but more exacting standard for the issuance of such protective orders. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). That Court determined that to issue the requested protective order, "the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." *Id.* at 191. *See also Bernard v. Gulf Oil Co.*, 619 F.2d 459, 476-77 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89 (1981); *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975).

Since all protective orders restraining publication directly infringe on substantial First Amendment interests, they must be subject to the strictest scrutiny. However, because the record in this case does not support the protective order issued here even under the least stringent test formulated by the federal courts, this Court need not now decide how strong the showing must be before a protective order restraining speech will be upheld. It is clear that the Washington courts did not meet even the most basic standards that must be satisfied.

At a minimum, the First Amendment requires that a protective order limiting a party's right to publish information gained during discovery should not issue unless the court is able to "articulate in findings" that there is "an overriding interest" justifying the precise restriction sought to be imposed. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (Burger, C.J.). The moving party thus should demonstrate that the benefits to be gained from the protective order significantly outweigh the resulting harm to be imposed upon

the press and the public. Such a showing should be based upon particularized and precisely laid out facts. The nature of the information sought to be protected, whether the party seeking the order is a plaintiff or defendant, the exact harm sought to be prevented, and the nature of the claims involved in the litigation, may all properly be considered by the court in applying this constitutional standard.

In addition, a court should not issue a protective order that infringes the right of free press or free speech unless no alternative means exists to avoid the specified harms that is less intrusive upon the party's First Amendment interest. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968). In evaluating these standards, a court must determine that there is no other practical means by which to accomplish the avowed purpose of the protective order, that the order itself is precise and narrowly drawn, and that it will be effective to accomplish the desired end. *See Smith v. Daily Mail Publishing Co., supra*, 443 U.S. at 105.

The Washington courts utterly failed to apply the good cause standard of Civil Rule 26(c) consistent with these constitutional principles. In making the initial determination whether to enter the order, the trial court observed that "Protective Orders are entered routinely." JA 52a. It held that the moving party need only have a "reasonable basis" for any request to restrict the use of information gained through discovery, regardless what opposing interests may be implicated. Furthermore, the court stated that it would "put access to the courts on an equal plane of importance with freedom of the press" JA 54a because it believed that *as a general matter* (and without regard to any particular facts before it) protective orders are necessary to prevent a chill on a party's willingness to prosecute his case.

Such a conclusory assertion of the general need for protective orders cannot satisfy the particularized evaluation required by the First Amendment. Rather than scrutinizing the specific circumstances prevailing in the proceeding before it, the trial

court categorically ruled that a litigant's mere perceived need for a protective order will always outweigh any intrusion upon free speech or free press rights imposed by the order.[6]

The Washington Supreme Court similarly failed to state any basis for its conclusion that the defendants' First Amendment interests had been properly considered and found outweighed by an overriding interest of plaintiffs. The Washington Supreme Court summarily concluded that, as a general rule, "the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification." 98 Wash. 2d 256.[7] In short, the court held that First Amendment interests *never* suffice to override the entry of a protective order. Thus, in articulating the appropriate "good cause" test to be applied by the court under Civil Rule 26(c), the Washington Supreme Court entirely ignored defendants' First Amendment interests:

> Our understanding of the rule, contrary to that of the federal circuit courts in *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) and *In re San Juan Star Co.*, 662 F.2d 108 (1st

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6 This point is dramatized by the fact that the principal interest the court sought to balance against the First Amendment was the party's "willingness" to bring his case to court. Since even an irrational fear chills a "willingness" to litigate, a party need only utter his desire for a protective order to convince a Washington court to restrict another party's free press rights. The First Amendment does not tolerate restraints on free press simply to quell sheerly speculative fears. *Globe Newspaper Co. v. Superior Court, supra*, 457 U.S. at 609-10; *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 562; *Tinker v. Des Moines*, 393 U.S. 503, 509 (1969).

7 The Washington Supreme Court had assumed for the purposes of its discussion and holding that the protective order was a prior restraint, which it admitted carried a "heavy presumption" against its constitutionality. 98 Wash. 2d at 231, 239, 256. The ease with which the Washington Supreme Court concluded that a protective order barring publication of discovery materials is *per se* constitutional under the First Amendment is incredible when assessed against the traditional strictness with which intrusions on free press rights have been viewed. *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931).

> Cir. 1981), is that good cause is established if the moving party shows *that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process.* In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties. *The judge's major concern should be the facilitation of the discovery process and the protection of the integrity of that process,* which necessarily involves consideration of the privacy interest of the parties and, *in the ordinary case at least, does not require or condone publicity.*

98 Wash. 2d at 256 (emphasis added). This approach, which in effect creates a presumption in favor of protective orders, demonstrates that not even minimal regard was given the defendants' clear and legitimate interest in being free from restraints on their right to publish.

The Washington courts should have considered the extraordinary burden imposed upon the defendants' constitutional rights. The practical effect of the protective order is to curtail in midstream the *Seattle Times*' and *Union-Bulletin*'s continuing coverage of a newsworthy story, one of particular interest to the newspapers whose veracity has been publicly challenged. In these circumstances, effectively forbidding relevant commentary by defendants until after a trial which may be months or years away, or even indefinitely,[8] is a serious infringement of the newspapers' right to convey matters of current interest to their readers without delay or prior judicial approval.

Poised against the considerable harm inflicted on defendants' First Amendment interests is surprisingly scant articulation in the record of any significant harm to plaintiffs that might be avoided by the protective order. In neither decision is there any finding of specific facts warranting the conclusion

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8 The protective order entered by the Washington courts has no termination date, and the courts provided no comfort to defendants that the order would be dissolved during the trial or even at its conclusion.

that plaintiffs would suffer actual harm to any privacy interest by public disclosure of the requested information.[9] Moreover, there has been no attempt to relate the requested documents to a specific privacy interest of the plaintiffs. Finally, there is no indication nor factual basis in the record to support the Washington court's principal reason for upholding the order: that these plaintiffs, or indeed any plaintiffs, will be inhibited in aggressively litigating their claims here or, more generally, from using the courts to pursue their lawful remedies.

Even if the courts had identified some specific harm that could be caused by the publication of materials produced in discovery, no effort was made to identify any alternative to a flat prohibition on publication that might have infringed less upon First Amendment interests. Appropriate redactions of the materials to be discovered, for example, could well have prevented the precise invasion of plaintiffs' privacy interest to which the Washington courts alluded. *Cf. Department of the Air Force v. Rose*, 425 U.S. 352 (1976). The court could also have sought to narrow the scope of the discovery request, to conduct an *in camera* examination of the materials, or even to delay discovery of these materials while the parties proceeded to examine less sensitive documents. *See Marrese v. American Academy of Orthopoedic Surgeons,* 692 F.2d 1083 (7th Cir. 1983).

Finally, the court should have considered the extent to which the protective order would be effective. The issue was not, as the Washington courts branded it, whether defendants would abide by the order. The question is whether—through a variety of other sources such as former members of the Aquarian Foundation and other investigations—the same material would be given to the public in any event. It would also have been appropriate for the court to consider the likelihood that the information will become part of the public record at trial. The Washington courts did not even examine these questions.

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9 The trial court specifically struck language in the order that would have specified the court's reliance on plaintiffs' contentions concerning their purported interests of privacy and freedom of association and religion. JA 64a.

CONCLUSION

Under the rule announced by the Washington Supreme Court, there is no breathing space in Civil Rule 26(c) for the First Amendment. The court did not attempt to evaluate the facts that could have led it to make an informed and sensitive assessment of the First Amendment concerns raised in this proceeding. We urge this Court to recognize the failure of the Washington courts to apply the constitutionally mandated standard, and to vacate the judgment of the Washington Supreme Court and remand it for a determination as to the order, if any, which may be entered under Civil Rule 26 consistent with this opinion.

Respectfully submitted,

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